THE ORIGIN AND DEVELOPMENT OF THE INDIANA BAR EXAMINATION

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It has been 180 years since Indiana achieved statehood, but for only sixty-five of those years has the state required that persons desiring to practice law pass a bar examination. In fact, the constitution of 1816 did not mention attorneys. However, article VII, section 21 of the constitution of 1851 provided: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." Although this provision covered male citizens, it did nothing for women who were not entitled to vote at that time.

This constitutional provision remained the law for a little over eighty years, during which time county bar associations adopted their own ways of determining good moral character. Some, for instance, actually conducted an adversary hearing in which the applicant had the burden of proving the quality of his character with questions on the law deemed germane to the proceeding. In other counties, it was the custom to admit retiring county clerks to the bar on their last day of service in office. This custom was sometimes stretched to include retiring county recorders. There was a certain member of the bar in Pike County of whom it was said, with reference to his legal education, that he had graduated *cum laude* from the county recorder's office. The remark ceased to be quite so humorous when this individual was elected judge of the circuit court and favored the taxpayers with six years of judges pro tempore.

At the 1881 session of the Indiana General Assembly, Senate Joint Resolution 14 was proposed to amend article VII, section 21 to extend the right to practice law to a non-citizen who had declared an intention to become one, if that person had attained twenty-one years of age and was of good moral character. The committee to which the proposed resolution was referred recommended that it be amended to strike article VII, section 21 of the constitution. The amendment was adopted, but the joint resolution was not. The committee's action was the first attempt to repeal that provision. It would take another fifty years to get the job done.

In 1892, Benjamin Harrison was defeated for re-election as President of the United States, and returned to his law practice in Indianapolis. In June 1896, he invited a group of Indiana lawyers to meet with him for the purpose of organizing the Indiana State Bar Association. This was done, and Harrison was made president of the bar association. From that time forward, the bar association had as one of its major objectives the repeal of article VII, section 21.

The method for amending the Indiana Constitution appears in article XVI, section 1 as follows:

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> Any amendment or amendments to this Constitution, may be proposed in either branch of the General Assembly; and, if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the General Assembly to be chosen at the next general election; and if, in the General Assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each House, then it shall be the duty of the General Assembly to submit such amendment or amendments to the electors of State; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.

At the 1897 session of the general assembly, Senate Joint Resolution 5 was proposed to amend article VII, section 21 to allow the general assembly to prescribe qualifications to practice law in Indiana. The resolution was adopted and signed by the governor. As required by article XVI, section 1, the amendment was again submitted to and adopted by the general assembly at its 1899 session, signed by the governor, and submitted to the electorate in the general election of 1900. At the election the proposed amendment drew 240,031 votes for, and 144,072 against. However, there were 655,965 votes cast for the candidates for governor.

On the assumption that the proposed amendment had been adopted, and that the general assembly had failed to prescribe qualifications, the Marion Circuit Court adopted rules and appointed a board of examiners. Thereafter, one George L. Denny applied to be admitted to practice law in the Marion Circuit Court, with qualifications only that he was a person of good moral character and a voter in Marion County. He declined to submit to an examination on the law. His application was denied. On appeal, the Indiana Supreme Court held that the amendment had not been adopted, following its decision in *State v. Swift*.[1] *Swift* had interpreted article XVI, section 1 of the constitution to mean that when a proposed amendment is required to be submitted at a certain general election, and is made to depend upon a majority of the votes cast at "such election," a majority of *all* votes cast at the election is meant, not merely a majority of the votes cast on that particular question. Because the total of the votes cast for the amendment at the 1900 election was less than a majority of the total votes cast at the election, the amendment did not receive a constitutional majority. Therefore, the judgment of the Marion Circuit Court was reversed.[2] Presumably Mr. Denny enjoyed a long and lucrative practice; after all, he won his first case in the supreme court.

In 1903 and 1905, the general assembly again adopted a joint resolution proposing to amend article VII, section 21 exactly as had been proposed in 1897 and 1899. When the proposed amendment was submitted to the voters in the general election of 1906, it received more than three-fourths of the votes cast on

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1. 69 Ind. 505 (1880).
2. *In re* Denny, 59 N.E. 359 (Ind. 1901).

it, but once again failed for want of a constitutional majority. In 1907 and 1909, the general assembly once again enacted the joint resolution, which went before the voters in 1910 with the same result.

Following the 1910 election, one Charles W. Boswell, another pure but unlettered voter, applied for admission to the Marion County Bar, no doubt citing *Denny*. However, an objection was made, and the circuit court held a trial, finding against Boswell, who appealed. The supreme court noted that the proposed amendment, which it referred to as the "Lawyer's Amendment," had been before the legislature for many years and submitted to the people three times, always with a majority of the votes cast on the amendment in favor of ratification. However, it followed *Swift* and *Denny* and held that the proposed amendment had again failed for lack of receiving a majority of the total votes cast for state offices at the same election.[3] Mr. Boswell thus joined Mr. Denny as one who won his first case in the supreme court. Whether they entered into a partnership is unknown.

In 1929 and 1931, the Lawyer's Amendment was once again adopted by the general assembly and submitted to the voters at the general election of November 1932.[4] Once again, a substantial majority of the votes cast on the amendment were for ratification, but it lacked a constitutional majority. The general assembly of 1931, perhaps anticipating the result of the 1932 popular vote, also enacted the following: "The supreme court of this state shall have exclusive jurisdiction to admit attorneys to practice law in all courts of the state under such rules and regulations as it may prescribe."[5]

In July 1931, the supreme court adopted rules which, among other things, required an applicant to take an examination to determine his professional fitness. Whether the court acted illegally in adopting these rules in view of article VII, section 21 and *Swift*, *Denny*, and *Boswell*, is left for your consideration. In any event, in 1934, one Lemuel S. Todd, a voter twenty-one years of age and of good moral character, but innocent of legal training, applied to the supreme court for admission to practice insisting that neither the general assembly nor the court could require an examination in light of article VII, section 21. Amici curiae briefs filed by the Indiana State Bar Association suggested that the petition be dismissed. The court acknowledged that it would be necessary to overrule the above mentioned cases to hold that the 1932 amendment was valid, and then proceeded to do so in a fifteen page majority opinion written by Judge Walter E. Treanor.[6] The phrase "majority of [] electors," as contained in article XVI, section 1, of the constitution was now redefined to mean a majority of persons who vote on a proposed amendment, rather than a majority of all persons who vote at the election. The amendment was held to be adopted, and article VII, section 21 was eliminated from the constitution.

The bar examination requirement had thus been legitimized, after the fact.

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3. *In re* Boswell, 100 N.E. 833 (Ind. 1913).
4. *See* Act of Mar. 11, 1931, ch. 157, § 2(2), 1931 Ind. Acts 553.
5. Act of Mar. 5, 1931, ch. 64, § 1, 1931 Ind. Acts 150.
6. *In re* Todd, 193 N.E. 865 (Ind. 1935).

However, this was not the end of the fight. In the 1937 session of the general assembly, Senate Bill 195 attempted to place the bar examination under the supervision of the Judicial Council, rather than the supreme court. The bill passed the senate by an overwhelming vote of 41 to 1. Senate Bill 195 was also passed by the house, but only after it was amended by striking out everything after the enacting clause and substituting an anti-horse-racing bill. The senate indignantly refused to concur in the amendment.

At the same 1937 session, House Bill 189 would have repealed the 1931 act which gave the supreme court exclusive jurisdiction over bar admissions. House Bill 189 was assigned to Judiciary B, the "graveyard" committee, and was not heard from again. However, House Bill 134, a similar attack on the bar examination, was referred to the Committee on Organization of Courts, and a majority of the committee referred it back to the house with the recommendation that it be indefinitely postponed.

By 1937, a large number of persons without law school training had flunked the bar examination, and they and their friends, relatives, and fiancees, constituted a vigorous and vocal lobby in favor of the bill eliminating the examination requirement. They had, of course, lobbied their various representatives, with the result that the debate on the committee recommendation was loud and long. The name of Abraham Lincoln, who had practiced law quite successfully without attending law school, was invoked many times. The final, and perhaps deciding, speech was made by a freshman representative who was himself a junior in the Indiana University School of Law at Bloomington. If the bill was enacted, he would not have to take the bar examination, but he stated that he was willing to take the examination and thought that it was in the public interest to require all applicants do so. The bill was killed. I was that student-representative. (When I was confronted with the exam the following year, I questioned my chutzpah.)

In the 1939 general assembly, bills were offered in both the house and the senate to abolish the State Board of Bar Examiners. The house bill would have placed admission with each circuit (i.e., each county), and the senate bill would have placed admission with the Judicial Council—whatever that was. Both bills were defeated. This was the high water mark of the anti-examination movement, and since that time the board has been plagued only by the predictable grumbling of unsuccessful candidates.

The first State Board of Bar Examiners was appointed by the supreme court in 1931. It consisted of five attorneys, one selected by each judge from his own judicial district. The Board administered its first examination the same year. The examination consisted of fifty essay-type questions to be answered over two days. The same selection procedure for bar examiners is used today, except that each supreme court justice selects two board members from his or her own district to serve for a term of five years. Indiana is now one of only four states which use the essay-type questions. The examination still takes two days, but the board is getting a little soft: instead of fifty questions, applicants must answer only twenty-five out of twenty-eight. The board members write and grade their own questions, which doubtless explains why they do not ask so many, considering that over 700 applicants per year take the examination. Applicants

must also pass the Multistate Professional Responsibility Examination (MPRE) within two years before or after passing the essay examination.

Until recently, Admission and Discipline Rule 13 required that an applicant for admission to the bar have graduated from an approved law school (or was certified by the Dean of the school as being in line to graduate as a matter of course), and that the person have completed a given number of semester hours in a dozen designated basic courses, such as contracts, torts, and commercial law. On February 1, 1996, the Indiana Supreme Court abolished the latter requirement, to the surprise of many. This will no doubt please those schools which delight in offering exotic courses which have little relation to the real life of a lawyer. However, students should note that applicants will continue to be examined in the same subject areas as before, rather than, for instance, a new course such as Ballroom Dancing and the Law.

In any event, the bar examination is here to stay, and the essay test is surely the best test of both knowledge and writing ability. We do not anticipate any great changes in the near future.